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THE CASE OF GELPCKE *v.* DUBUQUE.

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[In assenting to a request to furnish the following paper for publication, the writer is aware that the form of it requires a word of explanation. In examining a disputed or obscure case it is sometimes found convenient, at Law Schools, to give the case out for argument at a Moot Court, as if upon a rehearing. Such a proceeding often involves anachronisms, *e. g.*, in the citation of later cases; but it has its advantages. The case of *Gelpcke v. Dubuque* (1 Wall. 175) was thus given out lately, here at Cambridge, and what follows was read, last June, as the opinion of the court in deciding that case. The writer is the more willing to have it printed, because, in sustaining the doctrine of the court, as an original question, he found himself arriving at an unexpected result, and also because the opinion here given makes one or two suggestions which appear to him important, and, at the same time, to be less insisted upon in the discussion of this case than they should be. Probably the general judgment of the legal profession would be that the opinion in *Gelpcke v. Dubuque* was a very inadequate one. Certainly it was a great while before the Supreme Court, in its steady adherence to the rule laid down in that case, succeeded in commending it to the approval of the profession. Among the many keen and able criticisms of this rule, reference may be made to those of Mr. Justice Holmes, in his notes to the twelfth edition of Kent's Commentaries; to an article attributed to Hon. John M. Reed, late Chief-Justice of Pennsylvania, in 9 *American Law Review*, 381; to Mr. G. W. Pepper's "Border Land of Federal and State Decisions;" and to Mr. W. M. Meigs's articles in 29 *Central Law Journal*, 465, 485, on certain questions growing out of what he designates as "the Federal doctrine of 'General Principles of Jurisprudence.'" — J. B. T.]

THIS case comes up on error to the District Court of the United States for Iowa, where a demurrer to the defendant's answer was overruled and judgment given for the defendant. The suit was brought to recover the amount of coupons on certain bonds of the defendant city, issued under color of authority from an act of the Legislature of Iowa. It was brought in the United States court by the plaintiffs, who are not citizens of Iowa, under those provisions of the Constitution and laws of the United States, by which persons who are not citizens of a State where they wish to sue one who is such a citizen, are permitted to avoid the danger of a possible bias and prejudice in the State courts in favor of their own people, by proceeding in a national tribunal sitting within that State. The defence was that the bonds were unlawfully issued, in that the Constitution of Iowa forbids the Legislature to create debts exceeding one hundred thousand dollars; and it is alleged that at the time of the statute authorizing these bonds, the indebtedness of the State and of the municipalities of the State exceeded

this amount. There were other grounds of this alleged unconstitutionality, but it is not needful to mention them.

The bonds were issued in 1857, in aid of a railroad company, and were payable to bearer, in New York, with a series of half-yearly coupons. The city was authorized to lay special taxes to pay the interest. For several years before they were issued, the Supreme Court of Iowa, in deciding other litigated cases like the present one, had upheld the constitutionality of similar issues of bonds. There were other statutes and other decisions of a similar character during several years after the bonds now in question were issued. At the time of bringing the present action, and long after the issue and negotiation of these bonds, namely, in 1862, the Supreme Court of Iowa had reversed its previous course of decision, and had held that the bonds were invalid, as being forbidden by the State constitution. In 1863 the present case came up to the Supreme Court of the United States, on error, and the judgment of the District Court overruling the plaintiff's demurrer and holding for the defendant was overruled, Mr. Justice Miller alone dissenting. The main struggle in the case, as it was argued in the Supreme Court, was over the question of following the State court in its decisions interpreting its own constitution. It was insisted, on behalf of the defendant, that the United States courts, in exercising their jurisdiction founded on the citizenship of parties, only administers the law of the State; and that in determining what the law of the State is, the United States courts are bound to follow the settled construction of the State courts, whether on a point of statute law or of common law. On the other side, it was urged that the law upon this matter now in issue was not settled in Iowa, or if it were settled, that the settled law was that of the earlier decisions; that so recent a decision as this of 1862, reversing the others, could not be held to have settled the law the other way; and the court was invited to examine the question anew and settle it for itself. But the court, speaking through Mr. Justice Swayne, while plainly indicating its approval of the older decisions, and its disapproval of the last one, and while stating its own view that the new opinion had not settled the law, nevertheless declined to go into the question of whether the earlier decisions were right, or to examine the question at all, or to follow any rule which required them, in such a case as the present, to adhere to the decision of the State courts;

and they proceeded to lay down the important principle that where the law of the State was settled, at the time the bonds were issued, in favor of the legal validity of the bonds, they could not afterwards be held invalid, even by a court which should be of opinion that the former construction of the constitution was wrong. This proposition, first established in the present case, has since, against much opposition and criticism, been steadily followed in the Supreme Court. Indeed, within a few years after the decision of the present case, which was at the December term, 1863, the Supreme Court declared that the question was no longer open to controversy before them.

The case has now been argued as upon a rehearing. It comes up as if we were dealing with it just after it had been decided in the Supreme Court of the United States, at a time when, if sufficient reason should appear, the former decision might be reversed. Is this proposition, then, in the case of *Gelpcke v. Dubuque*, a sound one and rightly applied? In order to determine that question we must first take several matters clearly into account.

There is a well-known difference in the way in which cases may be brought into the United States courts. (*a*) They may come there because the case involves a question under the Constitution, treaties, or laws of the United States. In such cases the United States Supreme Court is the ultimate tribunal of appeal, whether the case has come up from a State court or from an inferior court of the United States. It has no duty of following the laws of the States, for it is now administering the law of its own government. If, in such a case, there be a question of impairing the obligation of a contract, and the State court has held that there is no contract to be impaired, the Supreme Court may reëxamine that question with entire freedom, although it involve the construction of the constitution or statutes of the State; it is not in any way bound to follow the decision of the State court. Such an unfettered power is necessary in order to the full exercise of the jurisdiction of the Supreme Court. In the case of the *Ohio Company v. Debolt*, 16 How., at p. 432, on error to the Supreme Court of Ohio, Chief Justice Taney, speaking, probably, for a majority of the court, remarked: "The duty imposed upon this court to enforce contracts . . . would be vain and nugatory if we were bound to follow those changes in judicial

decisions which the lapse of time and the change in judicial officers will often produce. The writ of error to a State court would be no protection to a contract if we were bound to follow the judgment which the State court had given, and which the writ of error brings up for revision here." (b) But there is another ground for coming into the courts of the United States. A case may come there, as this one has, not because of any question arising under the Constitution or laws of the United States, but simply because the plaintiff and defendant are citizens of different States or countries. In such a case the court is administering the law of the State. In this sort of case the general rule is, that, since the court is applying the law of the State, it will follow, in determining what that law is and in construing it, the decisions of its highest court. If the question has not ever come up in the State court, or if there be no settled rule there, the United States court must, of course, decide for itself. But, even after such an independent decision has been made, if the highest court of the State should arrive at a different conclusion, the United States court will, in general, change from its own previous decision, and will adopt that of the State courts.<sup>1</sup> Nothing could more plainly mark the secondary character of the jurisdiction of United States courts in this region of it.

But there are various qualifications of these doctrines. The most conspicuous of them is the principle of *Swift v. Tyson*, 16 Pet. 1 (1842), in which the novel and much-contested doctrine was laid down, that upon questions of what are called general commercial law, the courts of the United States did not undertake to follow the State courts. This declaration was not required for the decision of that case, but it has been followed, and is an established rule of the United States jurisprudence. Its soundness in point of principle is, perhaps, open to question; at any rate, it is undergoing much criticism at the present day. The same principle is laid down as regards the construction of ordinary language (*Lane v. Vick*, 3 How. 464, 476); but in that case there was a strong dissenting opinion of McKinley, J., concurred in by Taney, C. J. Again, when the United States court has already decided a question, and a later decision of the State differs from this, the United States court may at least wait awhile before chang-

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<sup>1</sup> *Green v. Neal's Lessee*, 6 Pet. 291; *Carroll County Supervisors v. United States*, 18 Wall. 71.

ing its own decision.<sup>1</sup> And, finally, it was long ago intimated that a United States court would not follow the State decisions where these were regarded as biased, and unjust to citizens of other States. It will easily appear that in some sense and to some extent there should be a recognition of such a principle as the one just named; all State courts must keep within the line of reason in order to make it just that the United States courts should follow them. Yet, notwithstanding all these qualifications, it is still true, and is recognized as the sound general principle in the class of cases now under discussion, that the courts of the United States will follow the decisions of the State courts in ascertaining and construing their own law. The declarations to this effect are many and emphatic.<sup>2</sup>

It is with one of the qualifications of this rule that we are concerned in this case, namely, the one arising out of the danger to citizens of other States from local prejudice. I have said that some power of varying from the decisions of the States must necessarily exist, as regards this sort of case, that, at least, the local courts must keep within the limits of reason. Shall the range of the United States court, in differing from the local tribunals, go farther than that, and how much farther?

In *Rowan v. Runnels*, 5 How. 139 (a case coming up from the Circuit Court of the United States for Mississippi), Chief Justice Taney remarks: "We ought not to give to them [the decisions of State courts] a retroactive effect, and allow them to render invalid contracts entered into with citizens of other States, which in the judgment of this court were lawfully made. For if such a rule were adopted . . . it is evident that the provision in the Constitution of the United States which secures to the citizens of another State the right to sue in the courts of the United States, might become utterly useless and nugatory." This is the assertion of a right, which is, indeed, an obvious one, to depart from the State court's construction of the local law, in so far as is necessary to prevent the annulling of that protection for citizens of other States which the Constitution was intended to secure. For, although the courts of the United States in this sort of case have to apply the

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<sup>1</sup> *Shelby v. Guy*, 11 Wheat. 361.

<sup>2</sup> *Elmendorf v. Taylor*, 10 Wheat. 152, 159-60; *Webster v. Cooper*, 14 How. 488, 502-5; *Nesmith v. Sheldon*, 7 How. 812; *Williamson v. Berry*, 8 How. 495, 558; *Leffingwell v. Warren*, 2 Black, 599.

State law, it is to be remarked that they *are* courts of the United States, and not courts of the State. Why is it that a United States court is given this duty of administering the law of another jurisdiction? Why did the States allow it? Why was it important that the United States should have it? It was because, in controversies between its own citizens and those of other States or countries, it might be expected that the courts of any given State would not be free from bias. Accordingly we read, in No. 80 of the "Federalist," the very striking statement of Hamilton as regards the danger that might come from unjust decisions of the several States as against foreigners and citizens of other States, and the importance of that jurisdiction of the Federal courts which we are now considering: —

The responsibility for an injury, he says, ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the Federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. . . . The power of determining causes between two States, between one State and the citizens of another, and between the citizens of different States, is perhaps not less essential to the peace of the Union than that which has been just examined. History gives us a horrid picture of the dissensions and private wars which distracted and desolated Germany prior to the institution of the Imperial Chamber by Maximilian, towards the close of the fifteenth century; and informs us, at the same time, of the vast influence of that institution in appeasing the disorders and establishing the tranquillity of the empire. This was a court invested with authority to decide finally all differences among the members of the Germanic body. . . . It may be esteemed the basis of the Union that "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." And if it be a just principle that every government *ought to possess the means of executing its own provisions by its own authority*, it will follow that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence

to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.

To come back, now, to the question how far the United States courts may go in refusing to follow the decisions of the State courts. Shall they be limited merely to the prevention of results which would be absurd and irrational, or may they properly go farther? As I have already said, in this class of cases, as in all others, whenever a question develops which involves the law of the United States, the United States court must, as touching that, act independently, although its ground of jurisdiction over the case was originally merely the citizenship of the parties. But suppose no question of that kind to arise. That is the fact in the present case; this case, if originally brought in a State court, could not have been carried up to the Supreme Court of the United States, because it does not involve any question of a "law" impairing the obligation of contracts.<sup>1</sup> The lower United States courts, as we have seen, deal with such cases, because they have concurrent jurisdiction with the State courts on the ground of the citizenship of the parties; and, having regard to the reason that they are given this concurrent jurisdiction, namely, the danger of injury to citizens of other States or countries, by reason of the bias of the State courts, it may be laid down that wherever State courts are likely to be under a local bias, adverse to the citizens of other States or countries, the United States courts must hold themselves at liberty to depart from the decisions of the local courts in construing and applying the local law and the local constitution, to look into the question for themselves, and to adopt their own rules of administration. This appears to be only a just assertion of the power intended to be given to these courts by the Constitution of the United States, in dealing with the class of cases now under consideration. To this effect is the reasoning of Mr. Justice Bradley, speaking for the court, in *Burgess v. Seligman*, 107 U. S. 20 (1882).

Assuming this to be so, we have thus far only determined that the United States courts will look into such questions for themselves. The statement of Chief Justice Taney in the case of *Rowan v. Runnels*, above quoted, did not go beyond this. But in the case of *Gelpcke v. Dubuque*, the Supreme Court flatly refused

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<sup>1</sup> *Railroad Company v. McClure*, 10 Wall. 511.

to look into the merits of the question at all; and, in declining to follow the later decision of the Iowa court, a rule was laid down which established the validity of the bonds, irrespective of any opinion whether, as an original question, they were lawfully and constitutionally issued or not. The Supreme Court, quoting substantially an *obiter* remark of Taney, C. J., in *Ohio Co. v. Debolt*, 16 How., at p. 432, put forward this proposition: —

The sound and true rule is that if the contract when made was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity cannot be impaired by any subsequent action of legislation or decision of its courts altering the construction of the law.<sup>1</sup>

Has the United States court any right to say this? To announce that it will not look into the question, whether the bonds were originally authorized by the State constitution or not? Any right to say that although, in this court's judgment, it may be true, as an original question, that they were issued in violation of the State constitution, the court will still hold them to be valid?

With a certain qualification, I think that it has. The laying down of some rule of administration is legitimate, for the court, as we see, has the right to look into the question for itself; and all courts, in regulating the exercise of their functions, lay down, from time to time, rules of presumption and rules of administration. It is a usual, legitimate, necessary practice. It is, to be sure, judicial legislation; but it is impossible to exercise the judicial function without such incidental legislation. If this rule in *Gelpcke v. Dubuque* be understood, as it was probably meant, as being subject to a certain qualification, it appears to me good. It will not do, of course, to allow the United States courts, through the medium of any principle of presumption or judicial administration, or anything else, to sanction a violation of the State constitution or the State laws. There might be a case wherein the violation of the constitution was gross and palpable, and such that those who took part in it, whether in making contracts or doing anything else, must be held to have known what they were doing; and in such a case no court would be justified in laying down a rule that would protect these parties. But courts often have to recognize, especially

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<sup>1</sup> 1 Wall. 206.

in the region of constitutional law, that there is more than one reasonable and allowable interpretation of a thing. It is familiar that they will not set aside the interpretation put upon the constitution by a coördinate legislature, in enacting a law, unless the mistake be very plain indeed, — so plain (in the ordinary phrase used in such cases) as to be beyond reasonable doubt. If the rule be understood in this sense only, that any contract which was held good at the time of making it by the highest court of the State, *and which came within a permissible interpretation of the State constitution and law*, will be sustained in the United States courts, I think that it is a sound one, and should be upheld. It is a rule which the State court should accept; and if the adoption of it by the United States court lead to resistance on the part of the State authorities, that is a result which must be submitted to and dealt with as may be possible. Such temporary consequences were probably anticipated when the constitution was formed. But it may be confidently expected that so just a rule will ultimately commend itself to all courts. It will be observed that the rule is one regulating the administration of a particular jurisdiction of the United States courts. It does not necessarily follow that this same rule should be applied in any other class of cases.

Since the rule must be attended with the qualification above named, the question next arises whether the doctrine which was laid down in the earlier decisions in Iowa gives a construction to the constitution of that State which is a rational, a permissible one. I have no doubt that it does. Indeed, it appears to me that the Supreme Court of the United States is right in saying that this view was the just and sound interpretation of that constitution. And it may now be added also that the Supreme Court of Iowa, within seven or eight years after the decision of the Supreme Court of the United States in the present case, came back again to the doctrine of the earlier cases, and that this doctrine is now the fixed law of the State.<sup>1</sup> It is enough, however, to say that the view was one which might reasonably be held.

It will be observed that the decision of this case does not at all turn upon the clause of the Constitution of the United States relating to impairing the obligation of contracts; and it should be added that it does not in any degree turn upon a theory that the

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<sup>1</sup> Stewart v. Supervisors, 30 Iowa, 193.

United States courts have any special rights conferred upon them by the fact that the case relates to a contract. These courts are not the special protectors of contracts, excepting under the clause in the Constitution of the United States forbidding State *legislation* which implies their obligation. The ground of the present decision is that the courts of the United States are charged with a special duty, in litigation between citizens of different States; that the nature of this special duty requires these courts sometimes to exercise a perfectly independent judgment in construing and applying the laws and constitutions of the States; and that the rule of administration for the exercise of this function, laid down by the Supreme Court of the United States in *Gelpcke v. Dubuque*, is a just and wholesome one. The result is that the judgment of the District Court is reversed.